No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

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This brief responds to the Court's order of March 4, 2003, directing the parties to file supplemental briefs addressing the ripeness of petitioner's facial challenge to the National Park Service interpretive regulation providing, in relevant part, that concession contracts are not "contracts within the meaning of 41 U.S.C. 601 *et seq.* (the Contract Disputes Act)." 36 C.F.R. 51.3. Petitioner's pre-enforcement facial challenge to the regulation is not justiciable under either general ripeness principles or the specific jurisdictional provision for challenges to the solicitation of particular government contracts, 28 U.S.C. 1491(b).

"[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. Even when a ripeness question in a particular case is prudential, [the Court] may raise it on [its] own motion, and cannot be bound by the wishes of the parties." *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (citations and quotation omitted). The

determination whether a dispute is ripe for adjudication involves an inquiry into "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967).

This Court has recognized a general presumption that an agency regulation is not ordinarily ripe for judicial review until it is applied to a concrete factual setting. As this Court has written:

> [A] regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

Lujan v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

That presumption has not been overcome in this case. Petitioner's facial challenge to the regulation satisfies *neither* the fitness nor the hardship requirement of ripeness. While petitioner contends that a prospective bidder would be able to sue *in the context of a particular proposed concession contract* to seek a declaration that the regulation is invalid as applied to that contract, that proposition, even if true, would not justify petitioner's abstract facial challenge to the regulation.

A. Petitioner's Facial Challenge Is Not Fit For Judicial Resolution

Petitioner has not challenged the validity of the regulation in its application to a particular contract, but rather has made a "facial challenge[]" (Pet. C.A. Br. 13-14) to its validity.[1] That facial challenge cannot succeed because petitioner

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[1] Although petitioner claimed at oral argument that "there w[ere] both facial and as-applied * * * challenges to the" regulation (Oral Arg.

cannot demonstrate that *every* NPS concession contract is a procurement contract. See Gov't Br. 33-34. No court or administrative board has embraced the proposition that *every* NPS concession contract and concession permit constitutes procurement simply because it advances the Service's general interest in providing for the enjoyment of the parks.[2] See generally Gov't. Br. 34 (concession permits included

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Tr. 25), that statement is not borne out by the record. Petitioner's complaint did not reference any particular contract or contract solicitation in connection with its CDA claim. See J.A. 21-22. Xanterra's predecessor Amfac Resorts L.L.C. raised a claim about the validity of the regulation in the context of a *then-unissued* prospectus involving the Grand Canyon concession. Compl., *Amfac Resorts, Inc.* v. *United States Dep't of the Interior*, No. 00-2838, at 31-33 (D.D.C. Nov. 22, 2000). Thus, at the time the claim was filed, the regulation had not been "applied" to an actual proposal for the Grand Canyon contract, much less to Xanterra. Cf. *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) ("the jurisdiction of the Court depends upon the state of things at the time of the action brought"). In any event, in this Court, "Xanterra [is] not challenging specific actions that the NPS might take pursuant to its regulation—but rather the unlawful contours of the legal categories the regulation creates on its face." Xan. Reply Br. 9. Neither of the other two concessioners who were plaintiffs in the district court (but who are not before this Court) challenged this regulation as inconsistent with the CDA. See Compl., *Hamilton Stores, Inc.* v. *United States Dep't of the Interior*, No. 00-2937 (D.D.C. Dec. 8, 2000); Compl., *ARAMARK Sports & Entertainment Servs., Inc.* v. *United States Dep't of the Interior*, No. 00-3085 (D.D.C. Dec. 22, 2000).

[2] For example, the Comptroller General has held that permits that merely authorize a concessioner to conduct certain activities do not constitute a "procurement," although they obviously further NPS's interest in allowing for the public enjoyment of the national parks. See *Crystal Cruises, Inc.*, No. B-238,347, 1990 WL 277630, at *1 (Comp. Gen. Feb. 1, 1990) (concession permit for cruise-ship entry into park "is not a procurement of * * * services"), aff'd on reconsideration, 1990 WL 278100 (Comp. Gen. June 14, 1990); *John C. Lozinyak*, No. B-211,923, 1983 WL 35750, at *1 (Comp. Gen. Sept. 7, 1983) (permit to deliver pizza in park not a procurement because "[m]aking food and beverage service available to park visitors does not provide [an] important direct benefit to the Government"); see also *Watch Hill Concession, Inc.*, No. 4284-2000, 2001 WL 170911, at *6 (IBCA Feb. 16, 2001) (concession contract is a procurement contract "where the concessioner is *required* to perform specific services") (emphasis added).

within definition of "concession contract"). It therefore is clear that judicial resolution of questions concerning the application of the CDA to concession contracts would be assisted by addressing these questions in the concrete context of a particular contract or permit, when the Court will have additional information about its specific terms and conditions. Petitioner and Xanterra have suggested, for example, that the nature of services performed under a contract is relevant to whether the government is "procuring" those services, see Pet. Br. 22-23, as is the fact a concessioner may be required (as opposed to merely authorized) to perform visitor services. Pet. Br. 21-22; Xan. Br. 20, 22. They also have suggested that the nature of maintenance obligations under a contract demonstrates those services affirmatively benefit the United States (Pet. Br. 36), rather than simply offset wear caused by concession operations. Cf. *City & County of S.F.* v. *United States*, 615 F.2d 498, 504 (9th Cir. 1980) (maintenance requirements in lease of government property were "collateral," and "[i]t would distort the essential character of the lease transaction to treat it as a contract for the procurement of services").

Petitioner's own arguments thus suggest the record is insufficiently developed for the Court to make an informed determination about the nature and range of services provided under particular concession contracts. Moreover, the record in this case consists only of three actual prospectuses for Category I concession contracts, and three standard form contracts. The three actual prospectuses are unrepresentative, both because Category I contracts represent a minority of all concession contracts (see Gov't Lodging 10), and because these particular contracts are among the most comprehensive of all Category I contracts. Gov't Br. 31 n.15. Most concessions contracts involve far fewer services (and indeed, nearly two-thirds of the 388 NPS properties have *no* concession services, see Gov't Lodging 6). The form contracts shed little light on concessioners' obligations under

concession contracts, because they do not specify what visitor services will be provided under the contract or the terms under which they would be provided, but merely indicate that a "detailed description" of services will be provided later. See 65 Fed. Reg. 26,064 (2000); *id.* at 44,898, 44,911. Many other provisions are bracketed and may be deleted or substantially altered in particular cases. And in any event, the form contracts are only "internal guideline[s]" that "may be changed by the Director in his discretion to accommodate the circumstances of any particular contracting situation." *Id.* at 26,052; accord *id.* at 44,897. Cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 735-736 (1998) (claim unripe because an agency may "refine its policies").

B. Concessioners Will Not Be Harmed By Waiting To Challenge The Regulation In Connection With A Particular Contract Prospectus

The "major exception" to the principle that "a regulation is not ordinarily * * * 'ripe' for judicial review" until it has been applied to a particular party's situation is where the rule requires a party to change its primary conduct, such as where "the promulgation of the challenged regulations present[s] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Catholic Soc. Servs.*, 509 U.S. at 57.

1. The regulation at issue in this case does not govern the primary conduct of petitioner or any of its members. Rather, whether the CDA applies determines which forum (the IBCA, the Court of Federal Claims, or both) is available to resolve a dispute under the contract *if* one should arise and is not resolved informally by the parties, and whether prejudgment interest would be available to the concessioner *if* it prevailed in such a dispute *and* was awarded damages. Moreover, even if the agency's statement that concession contracts are not covered by the CDA were contained within

a legislative regulation, it would be unlike the sorts of regulations this Court has found to warrant pre-enforcement review, because it "do[es] not command anyone to do anything or to refrain from doing anything; [it] do[es] not grant, withhold, or modify any formal legal license, power, or authority; [it] do[es] not subject anyone to any civil or criminal liability; [it] create[s] no legal rights or obligations." *Ohio Forestry Ass'n*, 523 U.S. at 733. The fact that the regulation merely represents NPS's *position* with respect to the availability of IBCA adjudication and prejudgment interest in the event of a future dispute in which the concessioner prevails further militates against finding this claim is ripe.[3] See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) (challenge to statement in FCC report and order that FCC, not federal district courts, had authority to review certain telephone interconnection agreements was not ripe because "there is no immediate effect on the plaintiff's primary conduct").

2. Petitioner contends (Oral Arg. Tr. 7) that its claim is ripe for review because the regulation—along with *all other federal law*—is referenced in a standard contract provision stating that "[t]his CONTRACT, operations thereunder by the Concessioner and the administration of it by the Director, shall be subject to all Applicable Laws." J.A. 80; see also J.A. 69 (defining "Applicable Laws"); 65 Fed. Reg. at 26,065, 44,900, 44,911. Petitioner claims that pre-enforcement review of the NPS regulation is necessary because "it is important for the concessioners to know, at the time that they're deciding whether to bid on a contract and * * * how much to bid on a contract, what their rights are under that contract." Oral Arg. Tr. 8. Under petitioner's theory, a

[3] See J.A. 166 (NPS notes, in promulgating regulation, that it "*does not consider* that NPS concession contracts are subject to the [CDA]") (emphasis added); 57 Fed. Reg. 40,498 (1992) (in promulgating predecessor regulation, stating "NPS has never considered [concession contracts] a type of federal procurement contract").

prospective bidder on a contract would be permitted to raise a pre-enforcement challenge to *any* "*Federal, state [or] local laws, rules, regulations, requirements [or] policies*" (J.A. 69 (emphasis added)) that could affect its assessment of how much to bid on a contract, merely because they are referenced in "Applicable Laws."

Any practical impact on the concessioner that may result from the determination whether the CDA applies is contingent on future events: winning the contract, claims arising against the government under the contract, and (with respect to interest) prevailing on those claims and being awarded damages. See *Texas* v. *United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citation and internal quotation marks omitted). Moreover, a concessioner's wish to determine the general availability of particular fora to adjudicate future claims under a contract to which it is not yet a party, and the availability of interest for such claims, does not constitute the sort of hardship that will permit a pre-enforcement regulatory challenge. This Court has held that practical advantage to a party and avoiding inconvenience are insufficient to support ripeness. Instead, the Court ordinarily looks to whether the challenged regulation "*requires* the plaintiff to adjust his conduct immediately" (*National Wildlife Fed'n*, 497 U.S. at 891 (emphasis added)), or "inflicts significant practical harm" by "forc[ing] immediate compliance through fear of future sanctions." *Ohio Forestry Ass'n*, 523 U.S. at 733, 735 ("litigation cost saving" from mounting single legal challenge rather than contesting site-specific logging decisions insufficient "to justify review in a case that would otherwise be unripe").[4]

[4] Even taking petitioner's claim at face value, a concessioner does not need to know *which* forum (administrative or judicial) is available to hear claims under a concession contract, only that it will have "*de novo* review by an impartial adjudicator." Xan. Br. 24. Concessioners currently may

See also *Texas*, 523 U.S. at 301-302 (state's wish to determine before enforcement whether sanctions imposed against poorly performing school districts would be subject to the Voting Rights Act, so as to avoid delays and "threat to federalism," was insufficient to support finding of ripeness).

Even if this Court were to accept petitioner's contention that it is legally entitled to resolve the validity of the regulation (and of any other "Applicable Law[]") before bidding, however, it would not follow that petitioner's *facial challenge* is ripe. Petitioner has identified no way in which the regulation affects concessioners outside the context of *individual bid solicitations*. Because the only effect the regulation might have on a concessioner involves its decision whether to submit a bid on a particular concession contract, a concessioner is affected, if at all, *only* "at the time [it is] deciding whether to bid on a contract." Oral Arg. Tr. 8. Petitioner has offered no explanation for why the concessioners it represents must resolve the general validity of the regulation in advance of its application to a particular proposed contract. The absence of any substantial prejudice to petitioner or Xanterra demonstrates that their facial challenge is not justiciable. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163-164 (1967) (declining to address even "purely legal question" where "judicial appraisal * * * is likely to stand on a much surer footing in the context of a specific application of th[e] regulation than could be the case in the framework of [a] generalized challenge").

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seek de novo review of NPS action under concession contracts in federal court. See Gov't Br. 39. As indicated in petitioner's principal brief, a judicial forum for resolution of claims is entirely adequate to resolve any claims that may arise. Pet. Br. 18 ("direct access to court [is] critical to the fair resolution of disputes between the government and its contracting partners"); accord *id.* at 19 (noting the CDA's "critical goal[]" of "protect[ing] the right of government contractors to seek de novo review in court"); Xan. Br. 24 (CDA is necessary to ensure access "to the impartial courts").

C. Section 1491(b) Does Not Assist Petitioner

At oral argument, petitioner contended that 28 U.S.C. 1491(b) "provides for district court jurisdiction to adjudicate challenges to the terms of proposed Government contracts." Oral Arg. Tr. 60; *id.* at 11. That provision does not assist petitioner in making this "facial challenge" (Pet. C.A. Br. 13-14) to the validity of the NPS interpretive rule. That provision gives "[b]oth the Unite[d] States Court of Federal Claims and the district courts of the United States[5] * * * jurisdiction to render judgment on an action by an interested party *objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract* or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. 1491(b)(1) (emphasis added).

As indicated by use of the term "interested party" (which means "[a]n actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award the contract," Ralph C. Nash, Jr. et al., *The Government Contracts Reference Book* 308 (2d ed. 1998)), and the fact that it is written in the singular, Section 1491(b) by its own terms authorizes review only of the validity of particular bid and contract proposals. It does "not extend to review of the validity of the underlying regulations themselves," *Automated Communications Sys., Inc.* v. *United States*, 49 Fed. Cl. 570, 576 (2001), and would not authorize a court to strike down the regulation on its face. While Congress may dispense with prudential limitations on the exercise of jurisdiction by enacting "statutes permit[ting] broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even

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[5] The authority of the district courts to entertain such claims expired on January 1, 2001, shortly after the commencement of this case. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3875.

before the concrete effects normally required for APA review are felt" (*National Wildlife Fed'n*, 497 U.S. at 891), there is no indication it intended to do so through Section 1491(b), which is written as a grant of jurisdiction.[6] Indeed, courts have applied ordinary ripeness principles in adjudicating claims under the provision. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *United States*, 133 F. Supp. 2d 721 (D. Md. 2001), dismissed, 290 F.3d 734 (4th Cir. 2002). Tellingly, petitioner relied on the APA, not Section 1491(b), in asking the district court to review the validity of "the regulations and standard contract." See Concessioners' J. Opp. to Defendants' Mots. to Dismiss and for Summ. Judgment, No. 00-2838, at 16 (D.D.C. Feb. 28, 2001). Accordingly, the challenges are governed by standard principles of ripeness. Under those principles, petitioner's challenge is not justiciable.

Respectfully submitted.

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[6] Such statutes ordinarily *explicitly* provide for "judicial review of [a] rule" or regulation, 15 U.S.C. 2618, often within a set number of days. *Ibid.*; accord, *e.g.*, 30 U.S.C. 1276(a); 42 U.S.C. 6976; 42 U.S.C. 7607(b). See generally *Ohio Forestry Ass'n*, 523 U.S. at 737. Section 1491(b), however, has no provision explicitly permitting "judicial review" of a rule or regulation. The closest Section 1491(b)(1) comes to suggesting a deviation from ordinary principles of ripeness is its last sentence, which states that the court "shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded." But that language ties the court's jurisdiction to disputes over the solicitation of a particular contract and does not provide jurisdiction over a pre-enforcement challenge to a rule or regulation.